

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MIKE YELLEN,

Plaintiff,

No. CIV S-94-1298 GEB DAD P

vs.

ANA M. OLIVAREZ, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a former state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that his rights under the Eighth Amendment were violated during his incarceration at Deuel Vocational Institution (DVI) through exposure to contaminated water that was both unsafe to drink and unsanitary for bathing, cooking and maintaining oral hygiene. Specifically, plaintiff alleges that the water at DVI was unfit for human consumption, that the DVI plumbing is archaic, that DVI employees had been instructed not to drink the water, and that the faucet water in his cell looked like mud and had a putrid odor. Plaintiff claims that the water caused him to vomit, and that he is subject to future health risks due to the contaminated water. Plaintiff seeks both money damages and injunctive relief.

On January 19, 2007, plaintiff filed a motion to reopen discovery in this action. In the motion, plaintiff contends that he “has reason to believe that the water at [DVI] continues

1 to not be fit for human consumption” and he seeks to gather additional water samples from DVI
2 to submit to the court. The record reflects that plaintiff was paroled from the state prison system
3 in 2004, see Order filed April 11, 2005, and his motion bears a non-prison address. This action
4 is not certified as a class action and plaintiff is not qualified to represent the interests of
5 individuals presently incarcerated at DVI. See, e.g., McShane v. United States, 366 F.2d 286
6 (9th Cir. 1966) (individual proceeding in propria persona cannot ordinarily represent interests of
7 a class). In addition, plaintiff is no longer incarcerated there and has apparently not been at that
8 prison since he was transferred from DVI to another prison in 1997. For these reasons, plaintiff’s
9 motion to reopen discovery will be denied.

10 Defendants are no longer responsible for providing plaintiff with an adequate
11 water supply, and there is no evidence in the record that plaintiff has any expectation of being
12 incarcerated again at DVI. Accordingly, plaintiff’s request for injunctive relief should be
13 dismissed as moot. See Preiser v. Newwich, 422 U.S. 395, 402-03 (1975); Johnson v. Moore,
14 948 F.2d 517, 519 (9th Cir. 1990).¹

15 In accordance with the above, IT IS HEREBY ORDERED that plaintiff’s January
16 19, 2007 motion to reopen discovery is denied; and

17 IT IS HEREBY RECOMMENDED that plaintiff’s request for injunctive relief be
18 dismissed as moot.

19 These findings and recommendations are submitted to the United States District
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
21 days after being served with these findings and recommendations, any party may file written
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23 ¹ By order filed March 6, 1998, defense motions for summary judgment were dropped
24 from calendar pending receipt of a report from an expert appointed as a technical advisor to the
25 court. The expert has tendered his report and the court will, as appropriate, make findings and
26 recommendations on the motions for summary judgment following disposition of the instant
findings and recommendations by the district court. The undersigned apologizes to the parties
for the delay in addressing this overlooked pending motion which now has the court’s attention.

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
3 shall be served and filed within fourteen days after service of the objections. The parties are
4 advised that failure to file objections within the specified time may waive the right to appeal the
5 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: December 17, 2010.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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